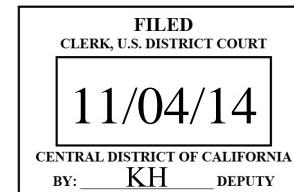


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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 NORMAN MILLAR COBB, } Case No. CV 14-0655 RNB  
12 Plaintiff, }  
13 vs. } ORDER REVERSING DECISION OF  
14 CAROLYN COLVIN, Acting } COMMISSIONER AND REMANDING  
Commissioner of Social Security, } FOR FURTHER ADMINISTRATIVE  
15 Defendant. } PROCEEDINGS  
16

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17 Plaintiff filed a Complaint herein on February 4, 2014, seeking review of the  
18 Commissioner's denial of his applications for Disability Insurance Benefits and  
19 Supplemental Security Income benefits. In accordance with the Court's Case  
20 Management Order, the parties filed a Joint Stipulation on October 9, 2014. Thus,  
21 this matter now is ready for decision.<sup>1</sup>  
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23  
24 <sup>1</sup> As the Court advised the parties in its Case Management Order, the  
25 decision in this case is being made on the basis of the pleadings, the administrative  
26 record ("AR"), and the Joint Stipulation ("Jt Stip") filed by the parties. In accordance  
27 with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined  
28 which party is entitled to judgment under the standards set forth in 42 U.S.C. §  
(continued...)

## **DISPUTED ISSUES**

As reflected in the Joint Stipulation, the disputed issues that plaintiff is raising as the grounds for reversal and remand are as follows:

1. Whether the Administrative Law Judge (“ALJ”) made a proper step two determination.
  2. Whether the ALJ properly considered the opinion of plaintiff’s treating physician.
  3. Whether the ALJ made a proper adverse credibility determination with respect to plaintiff’s subjective symptom testimony.
  4. Whether the ALJ made a proper adverse credibility determination with respect to the lay witness statement.

## DISCUSSION

For the reasons discussed hereafter, the Court concurs with the Commissioner that reversal is not warranted based on the ALJ's alleged failure to make a proper adverse credibility determination with respect to plaintiff's subjective symptom testimony, or based on the ALJ's alleged failure to make a proper adverse credibility determination with respect to the lay witness statement, or based on the ALJ's alleged failure to properly consider the treating physician's opinion. However, the Court is unable to affirm the ALJ's step two determination because the Court concurs with plaintiff that the ALJ failed to properly consider evidence of plaintiff's meralgia paresthetica.

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<sup>1</sup>(...continued)  
405(g).

1       **A. Reversal is not warranted based on the ALJ's alleged failure to make a**  
 2       **proper adverse credibility determination with respect to plaintiff's**  
 3       **subjective symptom testimony.**

4       Disputed Issue Three is directed to the ALJ's adverse credibility determination  
 5       with respect to plaintiff's subjective symptom testimony. (See Jt Stip at 20-28.)

6       An ALJ's assessment of pain severity and claimant credibility is entitled to  
 7       "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.  
 8       Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the "Cotton test," where as here  
 9       the claimant has produced objective medical evidence of an impairment which could  
 10      reasonably be expected to produce some degree of pain and/or other symptoms, and  
 11      the record is devoid of any affirmative evidence of malingering, the ALJ may reject  
 12      the claimant's testimony regarding the severity of the claimant's pain and/or other  
 13      symptoms only if the ALJ makes specific findings stating clear and convincing  
 14      reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see  
 15      also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12  
 16      F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991)  
 17      (en banc).

18       Here, plaintiff testified that he last worked in December 2008, when he was "let  
 19      go due to lack of production." (See AR 61.) He also testified that he can no longer  
 20      work because of "five areas that are wrong with me": upper back pain, shoulder  
 21      soreness, lower back pain, leg/calf pain, and a pinched nerve in his upper right thigh.  
 22      (See AR 64-66.) He also testified that on account of these conditions, he had trouble  
 23      walking and was limited to standing for 15-20 minutes at a time and sitting for 30-45  
 24      minutes at a time. (See AR at 64-66, 68.) He also testified that his daily activities  
 25      included laundry, light vacuuming, light cooking, and shopping. (See AR 75-76; see  
 26      also AR 268, 269.)

27       The ALJ determined that, although plaintiff's medically determinable  
 28      impairments could reasonably be expected to cause the alleged symptoms, plaintiff's

1 statements concerning the intensity, persistence, and limiting effects of these  
2 symptoms were not credible to the extent they were inconsistent with the ALJ's RFC  
3 assessment. (See AR 39-40.) As support for this adverse credibility determination,  
4 the ALJ stated four reasons. (See AR 40.) The Court finds that, although one of the  
5 ALJ's proffered reasons was legally insufficient to support his adverse credibility  
6 determination, the error was harmless because the other three reasons were legally  
7 sufficient.

8 One of the reasons stated by the ALJ was that plaintiff's daily activities were  
9 "not limited to the extent one would expect, given the complaints of disabling  
10 symptoms and limitations." (See AR 40.) The ALJ specifically noted that plaintiff  
11 reported no problems with his personal care, an ability to perform light household  
12 chores such as vacuuming and preparing simple meals, and an ability to go outside  
13 alone, go shopping, and take public transportation. (See AR 40; see also AR 75-76,  
14 268, 269.) In general, a claimant's statements about his daily activities "may be  
15 grounds for discrediting a claimant's testimony to the extent that they contradict  
16 claims of a totally debilitating impairment." Molina v. Astrue, 674 F.3d 1104, 1113  
17 (9th Cir. 2012). Here, however, the Court finds that this was not a legally sufficient  
18 reason on which the ALJ could properly rely in support of his adverse credibility  
19 determination because the ALJ ignored the full context of plaintiff's statements about  
20 his daily activities, which indicated that he performed them on a limited basis with  
21 help and rest. Specifically, plaintiff stated that he performs chores for 45-60 minutes  
22 before he takes a break, and that he requires help for heavy tasks; he also testified that  
23 he limits his vacuuming to one room at a time, limits his cooking to use of the  
24 microwave, and limits his shopping to 30 minutes at a time. (See AR 75-76, 268.)  
25 Plaintiff's statements about his activities, considered in their full context, do not  
26 establish that he exaggerated his symptoms. See Ghanim v. Colvin, 763 F.3d 1154,  
27 1165 (9th Cir. 2014) (ALJ improperly relied on evidence of claimant's daily activities  
28 for adverse credibility determination where claimant stated she performed only

1 limited activities, sometimes with help); Reddick v. Chater, 157 F.3d 715, 722-23 and  
2 n.1 (9th Cir. 1998) (same where ALJ did not properly consider claimant's statements  
3 about her daily activities in full context, which indicated claimant performed them  
4 with weakness, fatigue, and periodic rest).

5 Another reason for the ALJ's adverse credibility determination was that  
6 plaintiff's "allegedly disabling impairments have been present for a number of years,  
7 and there is minimal evidence to indicate a change in the level of severity of these  
8 impairments after [his] alleged onset date." (See AR 40.) The ALJ specifically noted  
9 that plaintiff had alleged back pain for the previous 15 years, right thigh pain for the  
10 previous 8 years, and that he also alleged a history of diabetes, hypertension, and high  
11 cholesterol. (See AR 40; see also AR 324, 357.) The ALJ also specifically noted  
12 that plaintiff's degenerative disc disease had been noted as "only mild to moderate,  
13 with little evidence of stenosis or nerve root compression." (See AR 40; see also AR  
14 382-85.) The ALJ concluded that since these impairments did not prevent plaintiff  
15 from working previously, it was strongly suggested that they would not currently  
16 prevent work. (See AR 40.) Preliminarily, the Court notes that, contrary to the ALJ's  
17 specific finding that there was "little evidence of stenosis or nerve root compression,"  
18 an MRI from 2011 evidenced "stenosis, moderate to severe, on the right side" of  
19 plaintiff's lumbar spine. (See AR 382.) Nonetheless, the Court finds that the crux  
20 of the ALJ's reasoning – that plaintiff's longstanding impairments would not  
21 currently prevent him from working because he had previously been able to work  
22 despite them – was supported by substantial evidence. Indeed, the record reflects that  
23 plaintiff worked for several years despite his longstanding impairments. (See AR 69,  
24 324, 718.) The Court therefore finds that this was a legally sufficient reason on  
25 which the ALJ could properly rely in support of his adverse credibility determination.  
26 See Bray v. Commissioner of Social Security Admin., 554 F.3d 1219, 1227 (9th Cir.  
27 2009) (claimant's work as personal caregiver for two years belied her claim of  
28 debilitating respiratory illness).

1       Another reason provided by the ALJ for his adverse credibility determination  
 2 was that plaintiff “may have stopped working for reasons other than his condition.”  
 3 (See AR 40.) The ALJ specifically noted plaintiff’s testimony that he was “let go”  
 4 from his sales position due to “lack of production” and plaintiff’s statement to an  
 5 examining physician that he was “laid off because business was slow.” (See AR 40;  
 6 see also AR 61, 333.) The Court finds that this also was a legally sufficient reason  
 7 on which the ALJ could properly rely in support of his adverse credibility  
 8 determination. See Bruton v. Massanari, 268 F.3d 824, 828 (9th Cir. 2001) (ALJ  
 9 properly discounted claimant’s credibility after finding that claimant stopped working  
 10 because he had been laid off); see also Tommasetti v. Astrue, 533 F.3d 1035, 1040  
 11 (9th Cir. 2008) (same where claimant stopped working because he had a large  
 12 financial reserve); Harrelson v. Astrue, 273 Fed. Appx. 632, 634 (9th Cir. 2008) (now  
 13 citable for its persuasive value per Ninth Circuit Rule 36-3) (same where claimant  
 14 stopped working because of religious reasons).<sup>2</sup>

15       Another similar reason provided by the ALJ for his adverse credibility  
 16 determination was that plaintiff told an examining psychiatrist that “he can work but  
 17 is unable to because of the loss of his driver’s license.” (See AR 40; see also AR  
 18 335.) The Court finds that this was a legally sufficient reason on which the ALJ  
 19 could properly rely in support of his adverse credibility determination. See Berry v.  
 20 Astrue, 622 F.3d 1228, 1235 (9th Cir. 2010) (ALJ properly discounted claimant’s

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22       <sup>2</sup>       The Court notes that the record includes a letter from plaintiff’s last  
 23 supervisor suggesting that, although “we could never be sure,” plaintiff’s back  
 24 problem also could have had an impact on the company’s decision to terminate  
 25 plaintiff’s employment. (See AR 295.) Given the letter’s equivocal tone, the Court  
 26 finds that it does not conclusively undermine the ALJ’s conclusion, based on his  
 27 interpretation of the evidence on the whole, that plaintiff was laid off for business  
 28 reasons. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence  
                  is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that  
                  must be upheld.”)

1 credibility where he stated his willingness to continue working). Although plaintiff  
 2 contends that this statement, made to a psychiatrist, was merely an expression of his  
 3 belief that he had a mental, but not physical, ability to work (see Jt Stip at 22), there  
 4 is no clear evidence that the statement was made with that condition (see AR 335).  
 5 At the very least, it was rational for the ALJ to interpret plaintiff's statement as an  
 6 expression of his unconditional belief that he could work, and it therefore must be  
 7 upheld despite plaintiff's contrary interpretation. See Burch, 400 F.3d at 679.

8 In sum, the Court finds that even if the ALJ did err in relying on one of his four  
 9 stated reasons in support of his adverse credibility determination, the error was  
 10 harmless because the ALJ's other three reasons and ultimate adverse credibility  
 11 determination were supported by substantial evidence. See Carmickle v. Comm'r  
Social Sec. Admin., 533 F.3d 1155, 1162-63 (9th Cir. 2008) (holding that ALJ's  
 12 reliance on two invalid reasons in support of adverse credibility determination was  
 13 harmless error where remaining reasons were adequately supported by substantial  
 14 evidence).

16

17 **B. Reversal is not warranted based on the ALJ's alleged failure to make a**  
**proper adverse credibility determination with respect to the lay witness**  
**statement.**

20 Disputed Issue Four is directed to the ALJ's alleged failure to properly consider  
 21 the testimony of plaintiff's brother, Jack Cobb. (See Jt Stip at 28-32.)

22 The law is well-established in this Circuit that lay witness testimony as to how  
 23 a claimant's symptoms affect the claimant's ability to work is competent evidence and  
 24 cannot be disregarded without providing specific reasons germane to the testimony  
 25 rejected. See, e.g., Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996); Smolen,  
 26 80 F.3d at 1288-89; Dodrill, 12 F.3d at 919.

27 Here, Mr. Cobb completed a "Function Report - Adult - Third Party"  
 28 describing plaintiff's activities and limitations. (See AR 249-56.) In the report, Mr.

1 Cobb stated that plaintiff's activities included watching television, reading, doing  
2 minimal yard work, preparing simple meals, doing laundry, cleaning his room, going  
3 outside, using public transportation, shopping for groceries, going out alone, visiting  
4 family and friends occasionally, and attending diversion and AA meetings. (See AR  
5 250-53.) Mr. Cobb also stated that plaintiff's shoulder problem limits his lifting  
6 ability and that his leg problem limits him to standing for approximately 20 minutes  
7 at a time and walking for limited distances. (See AR 249.)

8       The ALJ found that Mr. Cobb's statements were "partially credible" and  
9 credited the portion of Mr. Cobb's report describing plaintiff's daily activities  
10 because they were "not that limited, which is not inconsistent with the determination  
11 herein." (See AR 41.) The ALJ did not credit any of the other portions of Mr.  
12 Cobb's report and provided no supporting reasons.

13       The Court finds that the ALJ erred by failing to properly address Mr. Cobb's  
14 statements on the whole, particularly his statements that plaintiff could perform  
15 limited lifting, could stand for approximately 20 minutes at a time, and walk for  
16 limited distances. Nonetheless, the Court finds that the ALJ's error was harmless  
17 because one of the ALJ's reasons for rejecting plaintiff's testimony applied equally  
18 well to Mr. Cobb's virtually identical testimony about plaintiff's limitations. See  
19 Molina v. Astrue, 674 F.3d 1104, 1117-18 (9th Cir. 2012) ("Where lay witness  
20 testimony does not describe any limitations not already described by the claimant, and  
21 the ALJ's well-supported reasons for rejecting the claimant's testimony apply equally  
22 well to lay witness testimony," the ALJ's failure to discuss the lay witness testimony  
23 may be harmless error). As noted, the ALJ provided three legally sufficient reasons  
24 for rejecting plaintiff's subjective symptom testimony: plaintiff may have stopped  
25 working for reasons other than his condition, plaintiff stated that he can work, and  
26 plaintiff's impairments would not currently prevent him from working because he had  
27 previously worked with them. Although the first two reasons appear to be particular  
28 to plaintiff and therefore inapposite to Mr. Cobb's statements, the third reason for

1 rejecting plaintiff's subjective symptom testimony applied equally well to Mr. Cobb's  
 2 statements. In other words, since plaintiff's longstanding impairments did not  
 3 prevent him from working previously, it was strongly suggested that they would not  
 4 currently prevent work.

5

6 **C. Reversal is not warranted based on the ALJ's alleged failure to properly**  
 7 **consider the opinion of plaintiff's treating physician.**

8 Disputed Issue Two is directed to the ALJ's rejection of the opinion of Dr.  
 9 Okimoto, plaintiff's treating physician. (See Jt Stip at 9-19.)

10 The law is well established in this Circuit that a treating physician's opinions  
 11 are entitled to special weight because a treating physician is employed to cure and has  
 12 a greater opportunity to know and observe the patient as an individual. See  
 13 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). "The treating physician's  
 14 opinion is not, however, necessarily conclusive as to either a physical condition or the  
 15 ultimate issue of disability." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.  
 16 1989). The weight given a treating physician's opinion depends on whether it is  
 17 supported by sufficient medical data and is consistent with other evidence in the  
 18 record. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). If the treating physician's  
 19 opinion is uncontroverted by another doctor, it may be rejected only for "clear and  
 20 convincing" reasons. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996); Baxter  
 21 v. Sullivan, 923 F.3d 1391, 1396 (9th Cir. 1991). Where, as here, the treating  
 22 physician's opinion is controverted, it may be rejected only if the ALJ makes findings  
 23 setting forth specific and legitimate reasons that are based on the substantial evidence  
 24 of record. See, e.g., Reddick, 157 F.3d at 725 ("A treating physician's opinion on  
 25 disability, even if controverted, can be rejected only with specific and legitimate  
 26 reasons supported by substantial evidence in the record."); Magallanes, 881 F.2d at  
 27 751; Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987).

28 //

1       Here, Dr. Okimoto submitted two opinions in questionnaire form that the ALJ  
2 considered. (See AR 41.) First, in May 2012, Dr. Okimoto completed a “Medical  
3 Source Statement - Physical” describing plaintiff’s limitations from his lumbar disc  
4 disease, back pain, and meralgia parasthetica. (See AR 705-06.) Dr. Okimoto  
5 opined that plaintiff was limited to lifting 20 pounds occasionally and 10 pounds  
6 frequently, standing and/or walking for less than 2 hours in an 8 hour workday, and  
7 sitting for 3-4 hours in an 8 hour workday with hourly breaks. (See AR 705.)  
8 Second, in July 2012, Dr. Okimoto completed a “Disorders of the Spine Treating  
9 Physician Data Sheet” describing plaintiff’s limitations from his back condition. (See  
10 AR 709-14.) Dr. Okimoto opined that plaintiff was limited to lifting 20 pounds  
11 occasionally and less than 10 pounds frequently, and standing and/or walking for 15  
12 minutes at a time; he also opined, however, that plaintiff could walk without an  
13 assistive device. (See AR 712, 713.)

14       The ALJ gave significant weight only to the portions of Dr. Okimoto’s  
15 opinions indicating that plaintiff could lift and or carry 20 pounds occasionally and  
16 would not need an assistive device for ambulation. (See AR 42.) The ALJ did not  
17 credit the other portions of Dr. Okimoto’s opinions for four reasons. (See AR 41-42.)

18       One of the reasons stated by the ALJ was that Dr. Okimoto did not provide a  
19 date for when plaintiff’s limitations began. (See AR 42.) The Court finds that this  
20 was not a legally sufficient reason on which the ALJ could properly rely to partially  
21 credit Dr. Okimoto’s opinions. Nowhere in the opinions, which were in questionnaire  
22 form, is there a question asking Dr. Okimoto to provide a date for when plaintiff’s  
23 limitations began. (See AR 705-06, 709-14.) If the ALJ thought he needed this  
24 information in order to properly evaluate Dr. Okimoto’s opinions, he could have  
25 recontacted Dr. Okimoto. See Smolen, 80 F.3d at 1288 (“If the ALJ thought he  
26 needed to know the basis of Dr. Hoeflich’s opinions in order to evaluate them, he had  
27 a duty to conduct an appropriate inquiry, for example, by subpoenaing the physicians  
28 or submitting further questions to them.”).

1       Another reason stated by the ALJ was that Dr. Okimoto appeared “to have  
 2 relied quite heavily on the subjective report of symptoms and limitations provided by  
 3 the claimant, and seemed to accept as true most, if not all, of what claimant reported.”  
 4 (See AR 41.) In general, “[a]n ALJ may reject a treating physician’s opinion if it is  
 5 based ‘to a large extent’ on a claimant’s self-reports that have been properly  
 6 discounted as incredible.” Tommasetti, 533 F.3d at 1041. Here, however, the record  
 7 reflects that Dr. Okimoto’s opinions were based more heavily on Dr. Okimoto’s  
 8 independent tests and clinical observations than on plaintiff’s self-reports. (See AR  
 9 662, 664, 667, 670, 711, 716-18.) The Court therefore finds that this was not a  
 10 legally sufficient reason on which the ALJ could properly rely to partially credit Dr.  
 11 Okimoto’s opinions. See Ghanim, 763 F.3d at 1162 (“[W]hen an opinion is not more  
 12 heavily based on a patient’s self-reports than on clinical observations, there is no  
 13 evidentiary basis for rejecting the opinion.”) (citing Ryan v. Commissioner of Social  
 14 Sec., 528 F.3d 1194, 1199 (9th Cir. 2008)).

15       Another reason stated by the ALJ was that Dr. Okimoto had prescribed  
 16 “minimal and conservative treatment.” The ALJ specifically noted that Dr. Okimoto  
 17 did not recommend surgery, injections, or physical therapy for plaintiff’s back, and  
 18 even noted that plaintiff only just recently began taking a pain medication. (See AR  
 19 41; see also AR 710.) The Court finds that this was a legally sufficient reason on  
 20 which the ALJ could properly rely to not fully credit Dr. Okimoto’s opinion. See  
 21 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (treating physician’s opinion  
 22 that claimant was disabled was properly rejected where he had prescribed  
 23 conservative course of treatment); see also Matthews v. Shalala, 10 F.3d 678, 680  
 24 (ALJ properly rejected allegation of disabling back impairment where treating  
 25 physician did not consider claimant to be surgery candidate).

26       The final reason stated by the ALJ was that Dr. Okimoto’s opinions were  
 27 inconsistent with the objective medical evidence, which reflected that (1) plaintiff had  
 28 only mild to moderate degenerative disc disease (which had been described as

1 “slight” and evidenced only by “disc space narrowing”); and (2) there was little  
 2 change, as reflected in Dr. Okimoto’s treatment notes, in plaintiff’s condition from  
 3 the initial diagnosis that was given years ago. (See AR 41-42; see also AR 385, 706.)  
 4 The Court finds that this also was a legally sufficient reason on which the ALJ could  
 5 properly rely to not fully credit Dr. Okimoto’s opinions. See Tommasetti, 533 F.3d  
 6 at 1041 (ALJ properly rejected treating medical opinion that was “inconsistent with  
 7 the medical records”); see also Valentine v. Comm’r of Social Sec. Admin., 574 F.3d  
 8 685, 692-93 (9th Cir. 2009) (holding that contradiction between a treating physician’s  
 9 opinion and his treatment notes constitutes a specific and legitimate reason for  
 10 rejecting the treating physician’s opinion); Bayliss v. Barnhart, 427 F.3d 1211, 1216  
 11 (9th Cir. 2005) (holding that contradiction between treating physician’s assessment  
 12 and clinical notes justifies rejection of assessment); Thomas v. Barnhart, 278 F.3d  
 13 947, 957 (9th Cir. 2002) (“The ALJ need not accept the opinion of any physician,  
 14 including a treating physician, if that opinion is brief, conclusory, and inadequately  
 15 supported by clinical findings.”); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
 16 2001) (holding that treating physician’s opinion that was “unsupported by rationale  
 17 or treatment notes, and offered no objective medical findings” to support diagnoses  
 18 was properly rejected); Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995)  
 19 (holding that contradiction between doctor’s treatment notes and finding of disability  
 20 was valid reason to reject treating physician’s opinion).

21 In sum, although the ALJ proffered two legally insufficient reasons for not  
 22 fully crediting Dr. Okimoto’s opinions, the error was harmless because the ALJ also  
 23 proffered two independent, legally sufficient reasons supported by substantial  
 24 evidence. See Stout v. Commissioner of Social Security, 454 F.3d 1050, 1055 (9th  
 25 Cir. 2006) (an ALJ’s error is harmless when the error is inconsequential to the  
 26 ultimate non-disability determination); Curry v. Sullivan, 925 F.2d 1127, 1131 (9th  
 27 Cir. 1991) (harmless error rules applies to review of administrative decisions  
 28 regarding disability); see also Howell v. Commissioner Social Sec. Admin., 349 Fed.

1 Appx. 181, 184 (9th Cir. 2009) (now citable for its persuasive value per Ninth Circuit  
 2 Rule 36-3) (ALJ's erroneous rationale for rejecting treating physician's opinion was  
 3 harmless because the ALJ otherwise provided legally sufficient reasons to reject  
 4 opinion) (citing Stout, 454 F.3d at 1054); Donathan v. Astrue, 264 Fed. Appx. 556,  
 5 559 (9th Cir. 2008) (ALJ's erroneous characterization of treating physicians' opinions  
 6 was harmless "because the ALJ provided proper, independent reasons for rejecting  
 7 these opinions").

8

9 **D. The ALJ failed to make a proper step two determination.**

10 Disputed Issue One is directed to the ALJ's exclusion of plaintiff's meralgia  
 11 paresthetica from his step two finding. (See Jt Stip at 3-9.)

12 Step two of the Commissioner's sequential evaluation process requires the ALJ  
 13 to determine whether an impairment is severe or not severe. See 20 C.F.R.  
 14 §§ 404.1520(a), 416.920(a). The Social Security Regulations and Rulings, as well  
 15 as case law applying them, discuss the step two severity determination in terms of  
 16 what is "not severe." According to the Commissioner's regulations, an impairment  
 17 is not severe if it does not significantly limit the claimant's physical or mental ability  
 18 to do basic work activities." See 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c),  
 19 416.921(a). Basic work activities are "abilities and aptitudes necessary to do most  
 20 jobs," including "[p]hysical functions such as walking, standing, sitting, lifting,  
 21 pushing, pulling, reaching, carrying, or handling." Basic work activities also include  
 22 mental activities such as understanding, carrying out, and remembering simple  
 23 instructions; use of judgment; responding appropriately to supervision, co-workers,  
 24 and usual work situations; and dealing with changes in a routine work setting. See  
 25 20 C.F.R. §§ 404.1521(b), 416.921(b); Social Security Ruling ("SSR") 85-28. The  
 26 Ninth Circuit has described step two as "a de minimis screening device to dispose of  
 27 groundless claims." See Smolen, 80 F.3d at 1290; see also Webb v. Barnhart, 433  
 28 F.3d 683, 687 (9th Cir. 2005).

1       Here, the record reflects that plaintiff alleged meralgia paresthetica as one of  
 2 his disabling impairments and that physicians repeatedly diagnosed or mentioned his  
 3 meralgia paresthetica.<sup>3</sup> (See AR 66, 69, 71, 86, 360, 633, 638, 651, 705.) Moreover,  
 4 Dr. Holstein, a treating neurologist, opined that the meralgia paresthetica caused  
 5 “some sensory loss on the anterolateral aspect of [plaintiff’s] right leg.” (See AR  
 6 360.) Although the ALJ briefly mentioned plaintiff’s meralgia paresthetica in his  
 7 decision (see AR 37, 38), he excluded the impairment from his step two  
 8 determination without explanation.

9       The Court concurs with plaintiff that the ALJ erred by failing to properly  
 10 consider meralgia paresthetica as part of his step two determination, particularly in  
 11 light of the treating physician’s uncontested opinion that the condition resulted in  
 12 sensory loss. See Ingram v. Colvin, 2014 WL 1247891, at \*3-\*4 (C.D. Cal. Mar. 24,  
 13 2014) (step two determination required revisiting where ALJ failed to properly  
 14 consider claimant’s meralgia paresthetica resulting in sensory disturbance); Gonzalez  
 15 v. Astrue, 2008 WL 4889963, at \*4-\*5 (E.D. Wash. Nov. 12, 2008) (ALJ erred by  
 16 failing to articulate legally sufficient reasons for excluding meralgia paresthetica from  
 17 step two determination); see also Waldon v. Astrue, 2013 WL 2177782, at \*9-\*10  
 18 (S.D. Cal. May 20, 2013) (ALJ failed to properly defer to uncontested treating  
 19 physician’s opinion as to claimant’s meralgia paresthetica). In other words, the  
 20 medical evidence did not clearly establish that plaintiff’s meralgia paresthetica was  
 21 a non-severe impairment. See Webb, 433 F.3d at 687 (“[A]n ALJ may find that a  
 22 claimant lacks a medically severe impairment or combination of impairments only  
 23 when his conclusion is ‘clearly established by the medical evidence.’”) (quoting

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24  
 25       <sup>3</sup>       Meralgia paresthetica is a condition characterized by tingling, numbness,  
 26 and burning pain in the outer thigh. The cause of meralgia paresthetica is  
 27 compression of the nerve that supplies sensation to the skin surface of the thigh. See  
 28 <http://www.mayoclinic.org/diseases-conditions/meralgia-paresthetica/basics/definition/con-20030852>.

1 Social Security Ruling 85-28).

2 To the extent that the ALJ implicitly rejected Dr. Holstein's finding of sensory  
 3 loss in the right leg by determining that plaintiff had an RFC for light work that  
 4 enabled plaintiff to "stand and or walk for 6 hours in an 8-hour workday," it was  
 5 incumbent upon the ALJ to provide legally sufficient reasons before doing so. See  
 6 Lester, 81 F.3d at 830 (an ALJ must provide "specific and legitimate reasons  
 7 supported by substantial evidence in the record" to reject the opinion of a treating  
 8 physician, even if contradicted by another physician); see also Lingenfelter v. Astrue,  
 9 504 F.3d 1028, 1038 n.10 (9th Cir. 2007) (with respect to the requirements to provide  
 10 legally sufficient reasons to reject a treating physician's opinion, "an ALJ cannot  
 11 avoid these requirements simply by not mentioning the treating physician's opinion  
 12 and making findings contrary to it"). The ALJ did not provide any such reasons here.  
 13 Moreover, even if the ALJ had found Dr. Holstein's opinion to be ambiguous, it was  
 14 incumbent upon the ALJ to fulfill his special duty to properly develop the record  
 15 before implicitly rejecting the opinion and excluding the impairment from his step  
 16 two determination. See Webb, 433 F.3d at 687 (ALJ had duty to supplement record,  
 17 to the extent it was incomplete, before rendering non-severity finding at step two).

18 Accordingly, the Court finds that reversal is warranted based on the ALJ's  
 19 failure to make a proper step two determination.

## 21 CONCLUSION AND ORDER

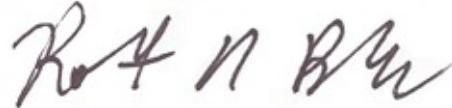
22 The law is well established that the decision whether to remand for further  
 23 proceedings or simply to award benefits is within the discretion of the Court. See,  
 24 e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister, 888 F.2d at  
 25 603; Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted  
 26 where additional administrative proceedings could remedy defects in the decision.  
 27 See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984); Lewin, 654 F.2d at  
 28 635. Remand for the payment of benefits is appropriate where no useful purpose

1 would be served by further administrative proceedings, Kornock v. Harris, 648 F.2d  
2 525, 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.  
3 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily  
4 delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985).

5 The Court has concluded that this is not an instance where no useful purpose  
6 would be served by further administrative proceedings; rather, additional  
7 administrative proceedings still could remedy the defects in the ALJ's decision.

8 Accordingly, IT IS HEREBY ORDERED that, pursuant to sentence four of 42  
9 U.S.C. § 405(g), Judgment be entered reversing the decision of the Commissioner of  
10 Social Security and remanding this matter for further administrative proceedings.<sup>4</sup>

11  
12 DATED: November 4, 2014



13  
14 ROBERT N. BLOCK  
15 UNITED STATES MAGISTRATE JUDGE  
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28       <sup>4</sup> It is not the Court's intent to limit the scope of the remand.